

Supreme Court No. 77706-3
COA No. 54171-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

JOHN COLEMAN,

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable James D. Cayce

PETITIONER'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

A. STATEMENT OF CASE ON REVIEW 1

B. ISSUE PRESENTED FOR DECISION 2

C. ARGUMENT 2

1. THE VIOLATION OF MR. COLEMAN'S RIGHT TO
A UNANIMOUS JURY ALSO REQUIRES REVERSAL
OF THE COUNT INVOLVING C.V. 2

(a). No election or unanimity instruction. 2

(b). In multiple act cases the State must make an election or
the court must instruct on unanimity. 3

(c). In this case the *Petrich* error requires reversal because
this Court cannot say that "no rational juror could have a reasonable
doubt as to any one of the incidents alleged." 3

(d). This Court should reject any argument by the State that
the jury "probably" did not rely on the Snow Dogs incident. 11

2. THE SENTENCING PROVISIONS OF SB 5477 DO
NOT APPLY RETROACTIVELY TO A NEW TRIAL OF
MR. COLEMAN'S 1999-2002 OFFENSES. 18

(a). SB 5477 is not retroactive. 19

(i) The amendment is not "curative." 23

(ii) The amendment is substantive, not "remedial", and
therefore retroactive application would violate due process. 24

(b). The Ex Post Facto Clause prohibits SB 5477 from being
applied against conduct that occurred before the statute's effective
date. " 27

D. CONCLUSION 32

TABLE OF AUTHORITIES

WASHINGTON CASES

Addleman v. Board of Prison Terms & Parole, 107 Wn.2d 503, 730 P.2d 1327 (1986). 24

State v. Bautista-Caldera, 56 Wn. App. 186, 783 P.2d 116, review denied, 114 Wn.2d 1011 (1990) 17,18

State v. Brooks, 77 Wn. App. 516, 892 P.2d 1099 (1995) 5,6

State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990) 7,8

State v. Cruz, 139 Wn.2d 186, 985 P.2d 384 (1999) 19,20,23

Godrey v. State, 84 Wn.2d 959, 530 P.2d 630 (1975). 24

State v. Gore, 143 Wn.2d 288, 21 P.3d 262 (2001). 23

State v. Handyside, 42 Wn. App. 412, 711 P.2d 379 (1985) 18

Howell v. Spokane & Inland Empire Blood Bank, 114 Wn.2d 42, 785 P.2d 815 (1990). 23

State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005) 30,31,32

Johnson v. Morris, 87 Wn.2d 922, 557 P.2d 1299 (1976). 28

State v. Jones, 71 Wn. App. 798, 863 P.2d 85, review denied, 124

State v. Kane, 101 Wn. App. 607, 5 P.3d 741 (2000) 20,22

State v. King, 75 Wn. App. 899, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021 (1994) 6

State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988) 3,4,5,7,8,9,16,17,18

PRP of LaChapelle, 153 Wn.2d 1, 100 P.3d 805 (2004). 23,27

<u>State v. Loehner</u> , 42 Wn. App. 408, 711 P.2d 377 (1985), <u>review denied</u> , 105 Wn.2d 1011 (1986).	3
<u>State v. Matlock</u> , 27 Wn. App. 152, 61 P.2d 684 (1980)	24
<u>In re Mota</u> , 114 Wn.2d 465, 788 P.2d 538 (1990)	24
<u>Overton v. Economic Assistance Auth.</u> , 96 Wn.2d 552, 637 P.2d 652 (1981).	24
<u>State v. Parker</u> , 132 Wn.2d 182, 927 P.2d 575 (1997)	28
<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984)	1,3,8
<u>In re Powell</u> , 117 Wn.2d 175, 814 P.2d 635 (1991).	27
<u>State v. Ryan</u> , 103 Wn.2d 165, 691 P.2d 197 (1984).	14
<u>State v. Smith</u> , 144 Wn.2d 665, 30 P.3d 1245 (2001)	22,23
<u>In re Personal Restraint of Smith</u> , 139 Wn.2d 199, 986 P.2d 131 (1999).	27
<u>State v. Stephens</u> , 93 Wn.2d 186, 607 P.2d 304 (1980)	3,13
Wn.2d 1018 (1993)	4,15,16
<u>PRP of Stewart</u> , 115 Wn. App. 319, 75 P.3d 521 (2003).	20,21
<u>State v. Ward</u> , 123 Wn.2d 488, 870 P.2d 295 (1994)	27
<u>State v. Workman</u> , 66 Wash. 292, 119 P. 751 (1911).	11
 <u>UNITED STATES SUPREME COURT CASES</u>	
<u>Addington v. Texas</u> , 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)	25
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004)	23

<u>Calder v. Bull</u> , 3 Dall. 386, 1 L.Ed 648 (1798).	28
<u>Chapman v. California</u> , 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967)	4
<u>Collins v. Youngblood</u> , 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990)	25,26
<u>Dobbert v. Florida</u> , 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977)	25
<u>Landgraf v. USI Film Prods.</u> , 511 U.S. 244, 114 S.Ct 1483, 128 L.Ed. 2d 229 (1994).	19,27
<u>Lynce v. Mathis</u> , 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997)	19,27
<u>Ring v. Arizona</u> , 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)	26
<u>Stogner v. California</u> , 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed. 2d 544 (2003)	28,29
<u>In Re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	25
<u>UNITED STATES COURT OF APPEALS CASES</u>	
<u>In re F.D. Processing, Inc.</u> , 119 Wn.2d 452, 832 P.2d 1303 (1992)	20,23,24
<u>United States v. Ortland</u> , 109 F.3d 539 (9th Cir. 1997).	28
<u>United States v. Payseno</u> , 782 F.2d 832 (9th Cir.1986).	3
<u>STATUTES</u>	
RCW 10.01.040.	20,21
RCW 9.94.728	21

RCW 9.94A.345	22
RCW 9.94A.530	23
RCW 9.94A.535	23

CONSTITUTIONAL PROVISIONS

U.S. Const., Amend. 6	3
U.S. Const. art. I, § 9	27
Wash. Const. art. I, § 23	27
Wash. Const. art. 1, § 21	3,13

A. STATEMENT OF CASE ON REVIEW

This Court granted review in State v. John Coleman, Court of Appeals case no. 54171-4-I. The defendant was convicted of two counts first degree child molestation (sexual contact) per RCW 9A.44.083, one count of the offense as to each of two complainants, C.V. and M.D., over a three year charging period of January 1, 1999 through January 31, 2002. CP 1-5. The children M.D. and C.V. both testified at trial, as did several child hearsay witnesses. 9/15/03 at 8, 73; 9/11/03 at 80-81, 103-04, 185.

On appeal, the State conceded and the Court of Appeals agreed that the case involved evidence of multiple acts, that the trial court did not give a unanimity instruction as required by State v. Petrich¹ and that the State did not elect specific instances of alleged molestation, to support the counts, in closing argument. Brief of Respondent, at p. 10; Appendix A (Decision, at p. 7).

The Court of Appeals reversed count II, relating to M.D., on the basis of the unanimity error, but held that the violation of the defendant's right to jury unanimity was harmless as to count I, involving C.V. Appendix A (Decision, at pp. 10-11.)

¹State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984).

B. ISSUE PRESENTED FOR DECISION

Whether the absence of express jury unanimity as to the count involving C.V. requires reversal, where the evidence presented at trial showed distinct and separately identifiable incidents of sexual contact by the defendant with C.V., occurring at different times and locations, and where the record reveals that there could have been a reasonable doubt in a juror's mind about at least one incident.

C. ARGUMENT

1. THE VIOLATION OF MR. COLEMAN'S RIGHT TO A UNANIMOUS JURY ALSO REQUIRES REVERSAL OF THE COUNT INVOLVING C.V.

(a). No election or unanimity instruction. In closing argument, the State did not elect from any of the particular incidents of molestation described by the State's witnesses, but instead, the prosecutor told the jury merely that "this case comes down to basically one simple question: Did the defendant touch those girls?" 9/16/03 at 7. The case was submitted to the jury without a unanimity instruction. CP 164-78; see WPIC 4.25. The Court of Appeals found that the lack of an election or a unanimity instruction required reversal of the count as to M.D. (A decision as to which the State has not sought review), but not the count as to C.V. Appendix A (Decision, at pp. 10-11).

(b). In multiple act cases the State must make an election or the court must instruct on unanimity. Criminal defendants have a right to an expressly unanimous jury verdict. Wash. Const. art. 1, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); U.S. Const., Amend. 6; United States v. Payseno, 782 F.2d 832, 836 (9th Cir.1986). In a case where the State presents evidence of multiple incidents of the offense but fails to elect which incident should be relied on by the jury, and the court fails to give a unanimity instruction, the right to jury unanimity is violated. State v. Petrich, 101 Wn.2d 566, 569-70, 683 P.2d 173 (1984); see also State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (same).

(c). In this case the *Petrich* error requires reversal because this Court cannot say that “no rational juror could have a reasonable doubt as to any one of the incidents alleged.” A Petrich error is presumed to be prejudicial, and this presumption can be overcome only "if no rational juror could have a reasonable doubt as to any one of the incidents alleged." (Emphasis added.) Kitchen, 110 Wn.2d at 411 (clarifying Petrich) (citing State v. Loehner, 42 Wn. App. 408, 411-12, 711 P.2d 377 (1985) (Scholfield, A.C.J., concurring), review denied, 105 Wn.2d 1011 (1986)). In Petrich error cases, which involve constitutional error, this standard is a

specific expression of the general requirement that constitutional errors require reversal unless the State proves it was "harmless beyond a reasonable doubt." Kitchen, at 412 (quoting Chapman v. California, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967)).

This analysis, its logic, and its application in the Washington cases,² means that affirmance of count I in the face of the Petrich unanimity error requires this Court to find that no reasonable juror in the case below could have done anything other than come to the conclusion that every single incident of sexual contact with C.V. presented by the State's evidence was proved beyond a reasonable doubt. For example, in Kitchen, the Court reversed two defendants' convictions, because multiple acts were placed into evidence and "a rational juror could have entertained reasonable doubt as to whether one or more of them actually occurred."

In both Mr. Coburn's and Mr. Kitchen's trials the prosecution placed testimony and circumstantial proof of multiple acts in evidence. There was conflicting testimony as to each of those acts and a rational juror could have entertained reasonable doubt as to whether one or more of them actually occurred. For example, some jurors may have based their verdict in State v. Albert Coburn on the testimony of the complaining witness in count 1 that Mr. Coburn touched her and attempted to touch her cousin when they were in the

²Save perhaps State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993), discussed at Part C.1.(e), infra.

woods, while others may have based their decision on incidents that allegedly took place in the bedroom. Some jurors may have believed that Mr. Coburn touched the complaining witness in count 3 on the night she became upset while others determined that she was upset that night for other reasons, relying upon another act as basis for their verdict. Similarly, a reasonable juror could have doubted the Kitchen complaining witness' testimony that incidents occurred in a shower and believed that only those acts before school in the trailer actually occurred. Faced with these trial records, we cannot say that failure to ensure that Mr. Coburn and Mr. Kitchen were afforded a unanimous jury verdict was harmless error.

(Emphasis added.) Kitchen, at 412.

For further example, in State v. Brooks, 77 Wn. App. 516, 892 P.2d 1099 (1995), a prosecution for burglary, no unanimity instruction was given and the State never elected which of two alleged burglaries it was relying on to convict -- the burglary of a storage shed during which a gas pump was removed, or the burglary of a pump house. State v. Brooks, 77 Wn. App. at 520. Reversal was required under the Kitchen standard because the trial evidence as to one of the multiple acts was conflicting -- Brooks testified that one "Dave" burglarized the storage shed. State v. Brooks, 77 Wn. App. at 521. Thus the Court concluded that a rational juror could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. State v.

Brooks, 77 Wn. App. at 521 (“Based upon this testimony, it is possible a rational juror could have had a reasonable doubt as to whether Mr. Brooks burglarized the storage shed”). See also State v. King, 75 Wn. App. 899, 903-04, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021 (1994) (unanimity error required reversal where evidence showed multiple acts of cocaine possession but evidence was conflicting as to defendant’s alleged possession of the cocaine in a fanny pack, since King testified he was unaware of it and asserted that police must have planted it) (“We cannot say that no rational trier of fact would entertain a reasonable doubt about King’s responsibility for the cocaine in his fanny pack”).³

At the Court of Appeals, the State argued that the jury was given a choice, in the State’s closing argument, of believing all of C.V.’s allegations, or rejecting her allegations entirely, and therefore, that the jury must have believed C.V. about all of the alleged incidents since it found the defendant guilty. Respondent’s Brief, at pp. 11, 15. This ignores the conflicting testimony presented

³The King Court also based reversal on the fact that conflicting evidence existed as to whether King possessed a Tylenol bottle containing drugs, which was found in the car in which he was riding. State v. King, 75 Wn. App. at 903-04. Importantly, however, reversal was required for the unanimity error because one incident, from among the multiple acts of possession, was supported by conflicting evidence; although conflicting evidence in fact was the basis of both of the multiple acts, the Court was plainly not holding that this was a requirement for reversal.

on the count as to C.V. in the evidence phase of the trial, and is an incorrect statement of the harmless error analysis in Petrich cases. The absence of a unanimity instruction is not harmless if it cannot be said that a reasonable juror could only find that every one of the alleged incidents presented at trial were proved beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411. As Justice Utter explained the rule in his concurring opinion in State v. Camarillo:

Because nothing in the record suggests that the credibility of the two principals varied as to any of the incidents and no other direct evidence of the acts was introduced, I agree that given the credibility judgment the jury must have made, no reasonable juror could have concluded that the defendant was innocent of any of the acts alleged. [But] [s]uch a conclusion will never be appropriate if the record reveals any evidence which could justify a reasonable doubt in any juror's mind about any given incident, even if the jury obviously believed the victim and not the defendant.

(Emphasis added.) State v. Camarillo, 115 Wn.2d 60, 73-74, 794 P.2d 850 (1990) (Utter, J., concurring). For example, in State v. Petrich, supra, the defendant's convictions for one count each of rape and indecent liberties (only the former requiring sexual intercourse) were overturned because there was no unanimity instruction or election, and although the child testified with specificity as to certain incidents, others were described "with attendant

confusion as to date and place, and uncertainty regarding the type of sexual contact that took place." Petrich, 101 Wn.2d at 573.

The evidence in the present case shows the same evidentiary conflict as in Kitchen and Petrich as to at least one particular incident of alleged molestation of C.V. That is, of itself, enough -- completely enough, not barely enough -- that reversal is required.

It is unnecessary to present an end-to-end summary of all the evidence presented at trial. The Court of Appeals was correct when it stated that the evidence showed that C.V. was allegedly molested by the defendant at numerous, discrete locations and at different times: C.V.'s house, at the defendant's house, in the car, and at the movies, rendering this a multiple acts case. Appendix A (Decision, at pp. 2-5). But more importantly, and critical to the reversible error analysis, there was one discrete incident regarding C.V. as to which the evidence was conflicting and contradictory – and reversal of that count is required because this Court cannot be sure there is no “possibility that some jurors may have relied on [that] incident and some another.” Kitchen, at 411; see Camarillo, 115 Wn.2d at 74.

In particular, the State's evidence included testimony about an incident occurring when the complainants and the defendant went to see the movie “Snow Dogs” in mid-January of 2002. The

school counselor, Ms. Barnes, testified that C.V. told her on January 22, 2002 that she, M.D., and Coleman had seen this movie a week previously. 9/11/03 at 80-81. C.V. specifically told Barnes that Mr. Coleman did not touch her during this outing. 9/11/03 at 80-81.

But social worker Trudnowski testified that she was told by C.V., on January 23, that the defendant had touched her the previous week, when the complainants and the defendant went to see "Snow Dogs." 9/11/03 at 99, 103. C.V. told Ms. Trudnowski,

Last Friday, we went to see the movie Snow Dogs and he touched me at the movies.

9/11/03 at 103. C.V. indicated that the defendant had touched her "in places he shouldn't" and on "her privates." 9/11/03 at 103.

Then, the other complainant, M.D., contradicted C.V.'s account to Trudnowski of what happened on this occasion, telling the police interviewer, Ms. Liebsack, that when she, C.V. and the defendant went to see the movie "Snow Dogs," "nothing really happened." 9/11/03 at 185.

Given the conflicting evidence, "a rational juror could have entertained reasonable doubt as to whether" the Snow Dogs incident "actually occurred." Kitchen, at 412. If affirmance in the face of a Petrich unanimity error requires the Court to find that no

reasonable juror could have done anything other than come to the conclusion that every single incident of sexual contact presented by the State's evidence was proved beyond a reasonable doubt, then the result in this case should be uncontroversial -- reversal of the count as to C.V. is mandated, in addition to the count involving M.D. as held by the Court of Appeals.⁴

This Court should be extremely reluctant to accept the State's arguments urging application of anything less stringent than this reversible error analysis announced in Petrich and Kitchen. Indeed, it can certainly be argued that the Petrich/Kitchen analysis is not rigorous enough, because it demands too little of the prosecution in order to secure affirmance of convictions in cases of constitutional unanimity error. This Court in Petrich Court relied on its prior decision in State v. Workman, wherein the Court had reversed a conviction for rape because the evidence tended to prove three distinct commissions of the offense at different times and places.

⁴Mr. Coleman argued at the Court of Appeals that reversal of count II was required because the various incidents described by M.D. were supported by different levels of detail and proof and that the jury may well have aggregated weak claims to conclude the defendant must have touched M.D. at some point in the several-year charging period. Appellant's Opening Brief, at pp. 21-22. The Court of Appeals reversed the count involving M.D., on ground that M.D.'s credibility was challenged generally and that she had specifically been impeached by a showing of a prior inconsistent statement as to whether she had touched the defendant's penis during one of the incidents she described, which had occurred at the defendant's house. Appendix A (Decision, at pp. 4-5, 11-12).

State v. Workman, 66 Wash. 292, 119 P. 751 (1911). The Workman Court held that the unanimity error required reversal since the case involved evidence of multiple acts, and this Court did not require, in order to reverse, that one or more of the incidents was supported by less than evidence that a rational juror could only find proved the count beyond a reasonable doubt. Workman, at 294-95. The Workman reasoning -- requiring reversal in any multiple acts cases where there has been no express assurance of unanimity -- establishes a test that truly protects the defendant's right to jury unanimity, because absent election or an instruction, no reviewing court can be sure the jurors all agreed on one incident, even if every incident was incontrovertibly proved. Workman would require reversal in this case based simply on the fact that evidence of multiple acts was presented at trial.

However, in any event, under the Petrich and Kitchen analysis, the fact that one of the incidents described by the State's evidence in this case as to C.V. was supported by conflicting and contradictory evidence requires reversal of count I.

(d). This Court should reject any argument by the State that the jury "probably" did not rely on the Snow Dogs incident.

At the Court of Appeals, the State argued that the Court could take

the following circumstances as assurances that no juror chose the “Snow Dogs” movie incident to support the count involving C.V.:

In closing, the prosecutor did not argue that molestation occurred at the movie, and, in fact, argued that the molestation only occurred in Coleman’s car and condo and C.V.’s house. . . . [G]iven that two of the three child hearsay witnesses testified that C.V. stated that no abuse occurred at the movie, that C.V. herself denied any misconduct occurred there, and that the prosecutor did not argue that molestation occurred at the movie, no rational juror would have convicted based upon the brief child hearsay testimony.

Brief of Respondent, at p. 17. The argument appears to be that the State somehow ‘quasi-elected’ to rely on every incident presented at trial, except the “Snow Dogs” incident on which the evidence was conflicting. First, this is not the test for whether a Petrich error is harmless. The question of whether a Petrich error is harmless is not decided by the State’s closing argument -- unless the State makes a clear election of one incident, in which case there is no Petrich issue in the first place. Rather, a Petrich problem arises when the “prosecution place[s] testimony and circumstantial proof of multiple acts in evidence” and then fails to make an election, in the absence of a unanimity instruction. (Emphasis added.) Kitchen, at 412. Petrich errors, and the presumption of harm therefrom, concern the danger that jurors, not having been urged to rely unanimously on a

particular incident, and not having been instructed that they must do so, may well (indeed, are presumed to) have chosen a different incident to support the count charged than did other jurors. In these circumstances, of course the law presumes that a jury, not instructed on unanimity, was not unanimous as constitutionally required, and the constitutional error standard requiring every incident to have been incontrovertibly proved in order to affirm in the absence of express unanimity is a standard that should not be diluted. Wash. Const. art. 1, § 21; U.S. Const., Amend. 6.

Second, in any event, the contention that the State told the jury not to, or suggested it should not, rely on the “Snow Dogs” incident, is inaccurate. In seeking guilty verdicts, the prosecutor offered up all the State’s evidence for consideration, asking the jury to “decide that these incidents they [the children] described did happen.” 9/16/03 at 6. And in fact the prosecutor specifically addressed the “Snow Dogs” incident, and asked the jury to reject the idea that contradictions in the evidence about this incident meant that C.V. was lying:

When [C.V.] says at one point something happened during the movies and another point it didn’t happen during the movies, does that make her a liar?

9/16/03 at 19. Unquestionably, the State encouraged the jury to consider all the evidence presented at trial, including the “Snow Dogs” incident. Certainly, the prosecutor never told the jury to ignore any evidence of any particular incident, much less this one.

Third, the fact that the evidence that C.V. was molested at the “Snow Dogs” movie came from the “child hearsay testimony” of Ms. Trudnowski, does not mean that no juror could have relied on that incident to support his or her vote to convict. Of course, the State’s argument in this respect is a complete about-face from the way the case was presented. The State successfully convinced the trial court that the child hearsay evidence met the reliability criteria of State v. Ryan, and then at trial the State extensively portrayed social worker Trudnowski as a professional “child sexual abuse” interviewer who understood how to elicit information from children without “putting words in their mouth,” and who was providing the jury with reliable “near verbatim” evidence of C.V.’s statements.

8/27/03 (vol. 1) and 8/27/03 (vol. 2) (Ryan hearings); 9/11/03 at 93, 97; see State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984).

Overall, the idea that the jury must surely have refused to consider the “Snow Dogs” incident when deliberating is untenable.

In making these arguments, the State cited the case of State v. Jones, 71 Wn. App. 798, 863 P.2d 85, review denied, 124 Wn.2d 1018 (1993), which the State apparently contends supports a better Petrich harmless error test than that which this Court currently applies. In Jones, the victim, A., testified to an incident of sexual contact with the defendant which occurred on a bed. A. testified that no other incidents had occurred, but the State's case also included hearsay statements she made to two individuals stating that multiple, other, distinct instances of touching had taken place. Jones, 71 Wn. App. at 821-22. The Court of Appeals decided, however, that the lack of a Petrich instruction or an election did not require reversal, reasoning that no rational juror would have relied on any of the other incidents to support guilt because the evidence of these incidents was hearsay, and in total, was either minimal or insufficient. Jones, 71 Wn. App. at 822-23.

Given the paucity of evidence of the other acts, and the fact that the testimony with regard to these acts was hearsay and inconsistent with the victim's trial testimony, we do not believe a rational trier of fact could have found that any other crimes were in fact committed. To put it another way, in this case we do not believe that there was sufficient evidence to go to the jury with respect to the other acts -- the evidence was simply not sufficiently substantial to raise this matter to a multiple acts case. Consequently, the lack of a unanimity instruction does not constitute

prejudicial error requiring reversal on the count of first degree child molestation.

(Footnote omitted.) Jones, 71 Wn. App. at 823-24.⁵

This reasoning in Jones is incorrect. Any weakness of the evidence of certain of the acts in Jones was not a reason to affirm, but in fact illustrates the constitutional danger of the lack of express unanimity. “The [Petrich] error stems from the possibility that some jurors may have relied on one incident and some another.” Kitchen, 110 Wn.2d at 411. It is the fact that one or some of the jurors in Jones might have relied on one of the other, non-bedroom incidents, as to which there was conflicting or weak evidence, that in fact should have mandated reversal. In such circumstances, a reviewing court certainly could not excuse the lack of express unanimity by concluding that even if each juror picked a different incident, at least each juror picked an incident that was incontrovertibly proved. And a court could certainly not be sure that no juror could have picked an incident that was not proved beyond a reasonable doubt, under the reasoning that, since every single

⁵In a somewhat alternative vein, the Court also reasoned that the case before it was less a multiple acts case than one in which the State relied on one incident and then, possibly improperly, also presented ER 404(b) evidence of other conduct. Jones, 71 Wn. App. at 823 n. 12. This is plainly not what happened in the present case, where the State presented evidence of multiple acts in support of the charged count.

incident was unquestionably so proved, a court could say that "no rational juror could have a reasonable doubt as to any one of the incidents alleged." (Emphasis added.) Kitchen, 110 Wn.2d at 411.

Finally, the Jones Court could not properly assume that, because the non-bedroom incidents were based on hearsay or on "insufficiently substantial" evidence, that no juror could possibly have chosen one of those incidents as support for his or her verdict. Jurors often rely solely on hearsay to find elements of crimes and to convict, and jurors also frequently find guilt based on legally insufficient evidence. Such verdicts may later be reversed, but it is plainly untenable to conclude within the Petrich context that no juror would ever rely on hearsay, or on weak or insufficient evidence, as a basis for his or her verdict.

The State's reliance on Jones is misplaced because that case's reasoning is contrary to Petrich and Kitchen. The argument that this Court can affirm Count I on ground that it is "probable" that no juror picked the "Snow Dogs" incident as support for his or her guilty verdict as to C.V. is not the test for whether a Petrich error is harmless. See State v. Bautista-Caldera, 56 Wn. App. 186, 192-93, 783 P.2d 116, review denied, 114 Wn.2d 1011 (1990) (holding that in the absence of an election, "we are not persuaded by the State's

attempt, through a complicated and highly speculative process of elimination, to identify those acts that the jury probably relied upon") (Emphasis added.) (citing State v. Handyside, 42 Wn. App. 412, 416, 711 P.2d 379 (1985) (failure to instruct on unanimity not harmless where there was "no basis in the evidence for concluding . . . that a rational juror could not have had reasonable doubts about the adequacy of the proof in support of one or more of the three incidents")). As the Court of Appeals in Bautista-Caldera correctly stated, the test for reversal in multiple acts cases is that a Petrich error is presumed to be prejudicial, and this presumption can be overcome only "if no rational juror could have a reasonable doubt as to any one of the incidents alleged." (Emphasis added.) Bautista-Caldera, at 192-93 (citing Kitchen, at 411). Under this test, this Court must reverse the defendant's conviction on count I, resulting in remand to the trial court for a new trial on both counts I and II.

2. THE SENTENCING PROVISIONS OF SB 5477 DO NOT APPLY RETROACTIVELY TO A NEW TRIAL OF MR. COLEMAN'S 1999-2002 OFFENSES.

In its answer to Mr. Coleman's petition for review, the State argued that "[t]he new amendments should apply to the resentencing hearing in this case." Answer to Petition for Review, at p. 5. The argument appears to be that, on re-trial of Mr. Coleman's

conviction on Count II, or on both Count I and II if this Court also reverses Count I as appellant has urged at Part C.2., supra, that the State may, pursuant to the so-called "Blakely 'fix' legislation," enacted April 14, 2005, seek conviction on not only the elements of the molestation offenses but on the additional elements of the aggravating factors on which Mr. Coleman was found guilty by the trial court in violation of the Sixth Amendment.

SB 5477 effected a substantive change to sentencing law in Washington by (1) requiring aggravating factors be proven to a jury; (2) elevating the burden of proof of aggravators to proof beyond a reasonable doubt; and (3) permitting the State to charge aggravating factors and introduce proof in support of them in the guilt or innocence phase of the trial. SB 5477 cannot be applied to any act which was committed before the statute's effective date -- April 15, 2005 -- including Mr. Coleman's alleged 1999-2002 crimes.

(a). SB 5477 is not retroactive. Newly enacted statutes are presumed not to apply retroactively. State v. Cruz, 139 Wn.2d 186, 190, 985 P.2d 384 (1999); Lynce v. Mathis, 519 U.S. 433, 439, 117 S.Ct. 891, 895, 137 L.Ed.2d 63 (1997); Landgraf v. USI Film Prods., 511 U.S. 244, 265, 114 S.Ct 1483, 1497, 128 L.Ed. 2d 229 (1994). This presumption may be overcome only in limited circumstances,

where (1) the Legislature clearly conveyed intent for retrospective application; (2) the amendment is "curative"; or (3) it is remedial. PRP of Stewart, 115 Wn. App. 319, 332, 75 P.3d 521 (2003).

Where a statutory amendment that establishes a penalty is silent as to legislative intent for retroactive application, the court need not attempt to determine if the statute is curative or remedial; the statute applies prospectively only. State v. Kane, 101 Wn. App. 607, 613, 5 P.3d 741 (2000); RCW 10.01.040. This is because the general "savings" statute, RCW 10.01.040, bars retroactive application of a statute unless the statute's language fairly conveys a legislative intent to apply to crimes committed prior to its enactment. State v. Kane, 101 Wn. App. at 614; RCW 10.01.040. Moreover, even if the stringent criteria set out in PRP of Stewart are satisfied, an amendment may still not apply retroactively if to do so would run afoul of any constitutional prohibition. In re F.D. Processing, Inc., 119 Wn.2d 452, 460, 832 P.2d 1303 (1992).

The Legislature did not express an intent for the new amendments to apply retroactively. An intent by the legislature that an amendment is to apply retroactively must be clearly found within the statute's language. State v. Cruz, 139 Wn.2d at 190; Kane, 101 Wn. App. at 614 ("the issue is whether the new statute's express

language shows the Legislature intended to depart from the presumption created by [RCW 10.01.040]" (Emphasis added.)

The Blakely fix legislation only provides that the amendment should take effect immediately. The statute's language does not remotely suggest the Legislature intended the statute to apply to cases that occurred prior to its enactment. The case of PRP of Stewart, 115 Wn. App. 319, supra, illustrates both that (1) the "effective immediately" provision does not, standing alone, convey an intent for retroactive application, and (2) when the Legislature intends that an amendment be applied retroactively, the Legislature states so explicitly. In Stewart, the court was asked to determine whether amendments to RCW 9.94.728 applied retroactively. The amendment – Senate Bill 6664 – included a similar "effective immediately" provision that the State claimed was evidence the Legislature intended the amendment to apply retroactively. The Court found the "effective immediately" language of the amendment established only the effective date of the statute. Stewart, 115 Wn. App. at 331. Accordingly, the Court reviewed legislative history to determine the Legislature's intent, and found from express language of intent in this history that the Legislature intended the amendment to apply retroactively, although the Court also found that retroactive

application would violate constitutional prohibitions. Stewart, 115 Wn. App. 333. Here, nothing in the legislative history of SB 5477 suggests an intent that the legislation apply retroactively. Nothing in any of the amendments to the bill or in the preamble – which sets forth many of the Legislature's purposes behind enacting the statute – indicates such an intent. The final bill specifically notes the effective date shall be April 15, 2005. Without specific and unambiguous language, such as that found in the legislative history materials considered by Stewart, legislative intent for retrospective application of SB 5477 is absent.

This conclusion is supported by the SRA's "timing" provision, which expressly and unambiguously states that “[a]ny sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.” RCW 9.94A.345; Kane, 101 Wn. App. at 618 (noting that although the Court's holding rests on the saving statute, it is "entirely consistent with the direction provided by" the timing statute).

This Court has consistently refused to apply sentencing statutes retroactively absent clear intent for retroactive application, and should do so here. State v. Smith, 144 Wn.2d 665, 674, 30

P.3d 1245 (2001); State v. Cruz, 139 Wn.2d at 193; PRP of LaChapelle, 153 Wn.2d 1, 5, 12-13, 100 P.3d 805 (2004).

Finally, even assuming arguendo that this Court may disregard the plain terms of the "savings" or "timing" statutes, any claim that SB 5477 is curative or remedial must nevertheless fail.

(i) The amendment is not "curative." A curative amendment clarifies or technically corrects an ambiguous statute. State v. Smith, 144 Wn.2d at 674; F.D. Processing, 119 Wn.2d at 461. An amendment must be "clearly curative" for it to be retroactively applied. F.D. Processing, 119 Wn.2d at 461, Howell v. Spokane & Inland Empire Blood Bank, 114 Wn.2d 42, 47, 785 P.2d 815 (1990). SB 5477 is not curative and certainly is not clearly so. It cannot be claimed that the Legislature, in enacting SB 5477, merely sought to clarify or correct an ambiguous statute. Rather, SB 5477 altered the unambiguous RCW 9.94A.530 and RCW 9.94A.535 by adding and creating new sections. Under the previous RCW 9.94A.535, a trial court was given the authority to impose an exceptional sentence based on its own factual findings. State v. Gore, 143 Wn.2d 288, 314, 21 P.3d 262 (2001). The purpose of the amendment was to revise the statute to comply with Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d

403 (2004), not to clarify any ambiguity. See preamble to SB 5477 ("The legislature intends to conform the sentencing reform act, chapter 9.94A RCW, to comply with the ruling in Blakely v. Washington"). Where ambiguity is lacking in statutory language, as in the previous RCW 9.94A.535, the court presumes an amendment to the statute constitutes a substantive change in the law, and the amendment presumptively is not to be applied retroactively. F.D. Processing, 119 Wn.2d at 462, Overton v. Economic Assistance Auth., 96 Wn.2d 552, 557, 637 P.2d 652 (1981). Since SB 5477 is not curative, it should not be applied retroactively.

(ii) The amendment is substantive, not "remedial", and therefore retroactive application would violate due process.

Generally, an amendment is deemed remedial and applied retroactively when it relates to practice, procedure or remedies, and does not affect a substantive or vested right. In re Mota, 114 Wn.2d 465, 471, 788 P.2d 538 (1990); Addleman v. Board of Prison Terms & Parole, 107 Wn.2d 503, 510, 730 P.2d 1327 (1986). Procedural rules apply to pending causes of action only insofar as they "do not affect a contractual or vested right or do not impose a penalty." State v. Matlock, 27 Wn. App. 152, 61 P.2d 684 (1980); Godrey v. State, 84 Wn.2d 959, 961, 530 P.2d 630 (1975). Since SB 5477

clearly has as its goal the imposition of a penalty -- an exceptional sentence -- it cannot be deemed a mere procedural rule that applies to pending cases. The United States Supreme Court has stated:

While . . . cases do not explicitly define what they mean by the word "procedural," it is logical to think that the term refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes.

Collins v. Youngblood, 497 U.S. 37, 45, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) (citing Dobbert v. Florida, 432 U.S. 282, 292, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977)).

SB 5477 is not procedural because it does more than merely set the procedures by which an exceptional sentence may be sought and imposed. It mandates that a jury, rather than a judge, determine the existence of an aggravating factor, thus significantly implicating a defendant's substantive Sixth Amendment right. Moreover, SB 5477 alters the state's burden of proof, further affecting the substantive right to due process of law. In Re Winship, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) ("This requirement that guilt of a criminal charge be established beyond a reasonable doubt dates at least from our early years as a Nation."); Addington v. Texas, 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (the standard of proof "allocate[s] the risk of error

between the litigants and . . . indicate[s] the relative importance attached to the ultimate decision"). SB 5477 also requires that except in limited circumstances, the evidence of the aggravating factor be presented at the same trial at which guilt is determined. In every respect, therefore, the aggravators function as elements of the crime, thus changing "the substantive law of crimes." Collins, 497 U.S. at 45; Ring v. Arizona, 536 U.S. 584, 610, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) ("the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt." (Scalia, J., concurring)). Finally, SB 5477 grants to the prosecutor greater rights than were available under any former version of the statute. SB 5477 grants the prosecutor the right to charge aggravating factors and present evidence of them to the jury, grossly expanding the scope and nature of the evidence that may be introduced against the accused at trial. SB 5477 is not, therefore, remedial. Retroactive application of this substantive statute would violate due process.

(b). The Ex Post Facto Clause prohibits SB 5477 from being applied against conduct that occurred before the statute's effective date. "The constitutional prohibition against ex post facto legislation is but a further manifestation of the repugnance with which such retroactive legislation is viewed." LaChapelle, 153 Wn.2d at 8 (citing Landgraf, 511 U.S. at 266). Even if SB 5477 is deemed to fall within the exceptions to the general rule of prospective application of an amendment, which it should not be, such retroactive application would violate the constitutional prohibition against ex post facto laws. Retroactive application is therefore barred. Stewart, 115 Wn. App at 333-34. A statute violates ex post facto prohibitions when it inflicts a greater punishment for the commission of a crime than that which was originally annexed to the crime when committed. Wash. Const. art. I, § 23; U.S. Const. art. I, § 9; In re Personal Restraint of Smith, 139 Wn.2d 199, 207-09, 986 P.2d 131 (1999). A law violates the ex post facto clause where it retroactively disadvantages an offender by altering the standard of punishment. Lynce v. Mathis, 519 U.S. 433, 137 L. Ed. 2d 63, 117 S.Ct. 891, 896 (1997); State v. Ward, 123 Wn.2d 488, 497, 870 P.2d 295 (1994); In re Powell, 117 Wn.2d 175, 184, 814 P.2d 635 (1991). Where amendments to sentencing

guidelines disadvantage an accused, they may not be retroactively applied without running afoul of ex post facto prohibitions. State v. Parker, 132 Wn.2d 182, 191-92, 927 P.2d 575 (1997); United States v. Ortland, 109 F.3d 539, 546 (9th Cir. 1997). It is the date of a defendant's alleged criminal act, not the date of his trial, which is the dispositive event that triggers an ex post facto violation. Johnson v. Morris, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976).

The Supreme Court has described four categories of laws that violate ex post facto prohibitions: (1) new laws that make noncriminal behavior, criminal; (2) new laws that inflict punishment upon a person not then subject to that punishment, to any degree; (3) new laws that aggravate the crime by increasing punishment; and (4) new laws that alter the legal rules of evidence. Stogner v. California, 539 U.S. 607, 612-613, 123 S.Ct. 2446, 156 L.Ed. 2d 544 (2003); Calder v. Bull, 3 Dall. 386, 1 L.Ed 648 (1798).

Although the defense disputes that SB 5477 is merely procedural, it is clear under recent United States Supreme Court jurisprudence that ex post facto analysis no longer rests on a procedural – substantive distinction, but instead on the consequences to the defendant which the new law imposes. Stogner involved a California law that revived the State's ability to

prosecute certain sex offenses after the original statute of limitations had expired. The State argued, as it does here, that the new statute of limitation law was a procedural change that did not upset any fair notice or reliance interest, since the defendant's alleged conduct was unquestionably prohibited under state law when committed. Justice Breyer, writing for the majority, did not disagree that Stogner had fair notice that he could have been punished for his conduct, but held the new statute of limitation law which revived an otherwise expired claim "authorized criminal prosecution that [state law] previously barred." Stogner v. California, 539 U.S. at 610. Consequently, the statute, when applied to Stogner, violated ex post facto prohibitions under Calder's second category – inflicting punishment upon a person not then subject to that punishment – since it enabled "punishment that courts lacked power to impose at the time the legislature acted." Stogner v. California, 539 U.S. at 615. Under Stogner's ex post facto analysis, a determination whether a new statute is procedural or substantive is no longer critical to the ex post facto determination; the important inquiry is whether the new statute had an adverse effect on the defendant. Application of SB 5477 to offenses alleged to have occurred prior to its enactment suffers from the same constitutional deficiencies as

application of the statute in Stogner, except that, instead of allowing punishment where none was permissible at the time, SB 5477 allows for a higher punishment than was permitted at the time of the offense – an ex post facto violation under the third Calder category.

This Court recently ruled that former RCW 9.94A.535 may not be applied to impose an exceptional sentence on persons whose case was pending at the time of the Blakely decision. State v. Hughes, 154 Wn.2d 118, 149, 110 P.3d 192 (2005). Any effort by the State to seek an exceptional sentence in this case, therefore, contravenes Hughes. In Hughes, the Court rejected the State's arguments that a jury could be empaneled to consider aggravating factors and impose an exceptional sentence because former RCW 9.94A.535 did not authorize such a procedure. For this reason, on remand, the defendants could receive a sentence no greater than the top of the standard range. Hughes, 110 P.3d at 208. By its express terms, SB 5477 was enacted to "cure" this situation and set up a Blakely-compliant process in which the facts necessary to support an exceptional sentence could be determined. The Legislature recognized that without a "Blakely fix," no defendant in Washington could receive an exceptional sentence.

The State is now seeking to subject the defendant to an increase in punishment that was not otherwise authorized before the enactment of SB 5477. The Washington Supreme Court in Hughes acknowledged that former RCW 9.94A.535 neither authorized the impaneling a jury nor proof of aggravating factors beyond a reasonable doubt, as required by Blakely, and so to impanel a jury would violate the statute. Consequently, the Court concluded the exceptional sentences imposed on the defendants in the case were unconstitutional and the maximum sentence that they could receive was the top of the presumptive standard range. Therefore, SB 5477 cannot be used to increase punishment for offenses that occurred before enactment since, at the time of the offense, an exceptional sentence was not permitted under former RCW 9.94A.535.

Finally, SB 5477 significantly alters the legal rules of evidence by enlarging the State's right to introduce evidence against the defendant at trial simply by alleging a specific aggravating factor. Consequently, evidence that would not otherwise be permitted during the guilt phase of a typical trial, is not only permitted but mandated under SB 5477. For example, formerly, if the State were to charge a person with theft in the first degree, the State could only introduce evidence that the property exceeded one

thousand five hundred dollars. RCW 9A.56.030. Under SB 5477's new evidentiary requirements, where the State further charges an aggravating factor of major economic loss, it would be authorized to introduce evidence at the guilt phase of the trial that "the current offense involved attempted or actual monetary loss substantially greater than typical for the offense." SB 5477, sec. 3(2)(d)(ii). The State would be permitted to introduce evidence to establish the aggravating factor that it would be prohibited from introducing in a typical theft charge. Therefore, retroactive application of SB 5477 would violate Calder's fourth category.

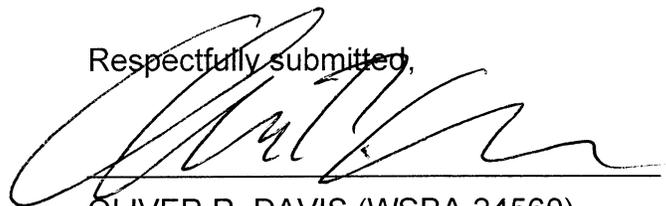
For the reasons stated, SB 5477 cannot apply to incidents that occurred prior to the date SB 5477 was enacted.

D. CONCLUSION

Mr. Coleman submits this Court must reverse his conviction as to C.V., and remand for a new trial on both counts I and II.

DATED this 31 day of July, 2005.

Respectfully submitted,



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Appendix A

Source: [Legal > / . . . / > WA State Cases, Combined](#)Terms: **coleman and uncle and johnny** ([Edit Search](#) | [Suggest Terms for My Search](#)) Select for FOCUS™ or Delivery*2005 Wash. App. LEXIS 1356, **STATE OF WASHINGTON, Respondent, v. JOHN **COLEMAN**, Appellant.

No. 54171-4-I

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

2005 Wash. App. LEXIS 1356

June 13, 2005, Filed

NOTICE: [*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.**PRIOR HISTORY:** Appeal from Superior Court of King County. Docket No: 02-1-05896-1. Date filed: 04/23/2004. Judge signing: Hon. Joan B Allison. State v. **Coleman**, 128 Wn. App. 1003, 2005 Wash. App. LEXIS 2205 (2005)**CASE SUMMARY****PROCEDURAL POSTURE:** Defendant challenged a decision from the Superior Court of King County (Washington), which convicted him of two counts of first degree child molestation.**OVERVIEW:** Two girls contended that defendant touched them improperly. They told a teacher, a school counselor, a parent, and a social worker. Defendant was convicted of two counts of child molestation, and an exceptional sentence was imposed. Defendant then sought review. On appeal, the court determined that defendant's constitutional rights to a unanimous verdict and jury trial were violated as to one of the victims because a unanimity instruction was not given. The case involved multiple acts, so the State was required to elect the act it was relying upon or the trial court was required to give the instruction. As to one victim, the error was harmless because that victim was not able to identify an particular incident of abuse; the evidence was the general pattern of ongoing abuse. However, the error was not harmless as to the second victim because she described two specific instances in detail. Next, the statements of the victims were properly admitted under Wash. Rev. Code § 9A.44.120(1). The trial court examined the relevant factors in determining that the statements were reliable. Finally, the exceptional sentence imposed was improper under *Blakely*, and the error was not harmless.**OUTCOME:** The court affirmed one conviction, reversed the other conviction, and remanded the case for further proceedings. On remand, the trial court was instructed to resentence defendant within the standard range.**CORE TERMS:** touching, girls, touch, unanimity instruction, juror, declarant, touched, reasonable doubt, bedroom, harmless error, prosecutor, general character, closing argument, general denial, unanimous jury, exceptional, harmless, sentence, deputy, interviewer, night, clothes, constitutional right, motion to dismiss, motive to lie, resentenced, reliability, hearsay, interview, bathroom**LexisNexis(R) Headnotes** ♦ [Hide Headnotes](#)[Criminal Law & Procedure > Jury Instructions > Particular Instructions > Unanimity](#) 

[Criminal Law & Procedure](#) > [Jury Instructions](#) > [Particular Instructions](#) > [Use of Particular Evidence](#) 

[Criminal Law & Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Harmless & Invited Errors](#) > [Jury Instructions](#) 

HN1  When the State presents evidence of several distinct criminal acts, each of which could form the basis for one charged count, either the State must "elect" the act that it is relying upon for conviction or the court must instruct the jury to agree on a specific act. The court's failure to follow this rule may result in a violation of the defendant's constitutional right to a unanimous jury verdict and right to a jury trial. An appellate court can affirm the jury's verdict only if the error was harmless beyond a reasonable doubt. Such an error in a multiple acts case is presumed to be prejudicial, and the presumption can be overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Trials](#) > [Examination of Witnesses](#) > [Child Witnesses](#) 

[Criminal Law & Procedure](#) > [Trials](#) > [Examination of Witnesses](#) > [Cross-Examination](#) 

[Evidence](#) > [Hearsay](#) > [Rule Components](#) > [Statements](#) 

HN2  An out-of-court statement by a testifying child victim is admissible under [Wash. Rev. Code § 9A.44.120\(1\)](#) if the court finds that the time, content, and circumstances of the statement provide sufficient indicia of reliability. In determining the reliability of child hearsay, a court considers nine nonexclusive factors, including (1) whether the declarant had an apparent motive to lie; (2) the declarant's general character; (3) whether more than one person heard the statements; (4) the spontaneity of the statements; and (5) the timing of the declaration and the relationship between the declarant and the witness. The court should also consider (6) whether the statements contain express assertions of past fact; (7) whether the declarant's lack of knowledge could be established by cross-examination; (8) the possibility of the declarant's recollection being faulty; and (9) whether the circumstances suggest the declarant misrepresented the defendant's involvement. The final four factors are often "not very helpful" in assessing the reliability of child hearsay. The trial court considers the foregoing factors as a whole; not every factor must be satisfied. No single factor is decisive. An appellate court reviews the trial court's determination of reliability solely for a manifest abuse of discretion. [More Like This Headnote](#)

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[Evidence](#) > [Procedural Considerations](#) > [Rulings on Evidence](#) 

HN3  Under *Blakely*, any fact that increases the penalty for an offense beyond that authorized by the verdict must be submitted to a jury and proved beyond a reasonable doubt. A harmless error analysis cannot be applied to *Blakely* errors. [More Like This Headnote](#)

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[Criminal Law & Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Abuse of Discretion](#) > [General Overview](#) 

HN4  Dismissal of a criminal prosecution is an extraordinary remedy and is reviewed for an abuse of discretion. [More Like This Headnote](#)

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[Criminal Law & Procedure](#) > [Appeals](#) > [Reversible Errors](#) > [Prosecutorial Misconduct](#) 

HNS When an issue is raised for the first time on appeal, an appellate court will not consider it. Wash. R. App. P. 2.5(a). [More Like This Headnote](#)

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HNG A deputy prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence. [More Like This Headnote](#)

COUNSEL: For Appellant(s): Washington Appellate Project, Attorney at Law, Seattle, WA; John(info Only) **Coleman** (Appearing Pro se) Monroe, WA; Oliver Ross Davis, Washington Appellate Project, Seattle, WA.

For Respondent(s): Prosecuting Atty King County, King Co Pros/App Unit Supervisor, Seattle, WA; Brian Martin McDonald, King County Prosecutor's Office, Seattle, WA.

JUDGES: Authored by Ronald Cox. Concurring: Susan Agid, William Baker.

OPINION: Per Curiam. A jury found John **Coleman** guilty of two counts of first degree child molestation. We agree that the trial court's failure to give a unanimity instruction violated **Coleman's** constitutional right to a unanimous jury as to Count II. But the error was harmless as to Count II. We further conclude that the trial court did not abuse its discretion in admitting child hearsay statements and that **Coleman's** pro se arguments are without merit. Finally, **Coleman's** exceptional sentences are [***2**] invalid under Blakely v. Washington, and he is entitled to be resentenced within the standard range. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

John **Coleman** was charged with two counts of first degree child molestation involving C.V. and M.D. In January 2002, C.V. and M.D. were friends and in the same fourth grade class. **Coleman** was the brother of C.V.'s grandfather and frequently took the girls out to dinner, shopping, and to the movies. The girls also visited **Coleman** in his condo on a number of occasions. **Coleman's** daughter recalled that **Coleman** had spent time "rough housing" with the girls in his bedroom with the door closed.

On January 22, 2002, M.D. approached Sarah McAlpin, the girls' teacher, and complained that C.V. was threatening to reveal one of M.D.'s "secrets." McAlpin, who was aware that M.D. had been abused by a relative at some time in the past, talked to C.V. about M.D.'s concern. During the course of the conversation, C.V. revealed that **Coleman** had been touching her "where her bathing suit covered her body." C.V. indicated that **Coleman** had touched her both on and under her clothes. McAlpin also spoke to M.D., who said [***3**] that "**Uncle Johnny**" had been touching her as well.

McAlpin reported her conversation to Christine Barnes, the school's counselor, and Barnes spoke with C.V. later that same day. C.V. said that "**Uncle Johnny**" had been touching her "down there," meaning her crotch area, and that the touching had occurred both at C.V.'s house and at **Coleman's** house. C.V. also said that **Coleman** had been touching M.D.

Marjorie Trudnowski, a CPS social worker, interviewed C.V. on January 23, 2002. C.V. pointed to her vagina and said that **Coleman** had been touching her under her clothes "down there." She said that the touching had occurred both at her house and in the car, and that it had occurred most often at **Coleman's** house. C.V. described specific incidents of touching that had occurred when C.V. and M.D. spent the night at **Coleman's** house and when **Coleman**, C.V., and M.D. were at the movie "Snow Dogs." C.V. indicated that **Coleman** had also done "the same thing" to M.D. in the past. **Coleman** told C.V. not to tell anyone about the touching because he would get into "deep, deep trouble."

At about this time, C.V. and M.D. also revealed the touching to M.D.'s mother. The girls said that C.V. had talked to [***4**] someone at school and wanted to tell M.D.'s mother before she heard from someone else. M.D. said that **Coleman** had touched her on her breast and vaginal areas while trying to explain sex to her. The girls indicated that they had not said anything earlier because they were still hoping to go on a trip to Hawaii that **Coleman** had been planning.

Christine Liebsack, an interview specialist for the King County Prosecutor's Office, spoke with C.V. on February 21, 2002. While reluctant to provide many details, C.V. eventually admitted that **Coleman** had been touching her "in places where he shouldn't." C.V. pointed to the crotch and buttocks of a body sketch to explain where **Coleman** had touched her. C.V. said that the touching had occurred mostly at **Coleman's** house. She indicated that the last time she had gone to the movies with **Coleman** and M.D., "nothing really happened." C.V. also saw **Coleman** touch M.D.

Liebsack interviewed M.D. on March 13, 2002. M.D. acknowledged that **Coleman** had been touching her on her chest, crotch, and buttocks areas, under her clothes. She described one incident of touching that had occurred when she and C.V. spent the night at **Coleman's** house. M.D. said that **Coleman** [*5] would occasionally ask her to touch him, but she "would just lie there." She denied that **Coleman** had ever made her touch him.

Both C.V. and M.D. also testified at trial. C.V. testified that **Coleman** had touched her in the "wrong places," by which she meant her vagina. C.V. was unable to recall many details about the touching incidents, but indicated they occurred primarily in the bedroom or living room of **Coleman's** house. C.V. also saw **Coleman** touch M.D. During cross-examination, C.V. denied that anything bad had happened when she and M.D. went to the movies with **Coleman**.

M.D. testified that **Coleman** would touch her on her breast and vagina, under her clothes. When this happened, M.D. would just "sit there quietly" because she was afraid her parents might find out. M.D. said that the touching always occurred in **Coleman's** house and that it occurred "a lot."

M.D. described one specific incident that occurred at **Coleman's** house while she and C.V. were watching "The Mummy Returns." M.D. sat in a leather chair next to **Coleman**, who reached up her shirt and started rubbing. After a few minutes, M.D. said she had to go to the bathroom and left the room. When she returned, she sat on the floor. [*6] M.D. also described an incident in the bedroom. While she was lying on the bed telling jokes, **Coleman** reached under M.D.'s pants and underwear and began rubbing. To stop the touching, M.D. moved down to the floor.

M.D. also described an incident in the bedroom in which **Coleman** made her touch his penis. In order to stop the touching, M.D. got up to go to the bathroom. She admitted that she had not told any of the interviewers about this incident. When asked why, she explained she was afraid that no one would believe her "because some people don't believe me a lot of times." On several occasions, M.D. watched **Coleman** rub C.V. underneath her shirt.

The jury found **Coleman** guilty as charged. The court then imposed concurrent 300-month exceptional sentences based on findings that **Coleman** abused a position of trust and that the offense was part of an on-going pattern of abuse.

Coleman first contends that his constitutional right to a unanimous jury was violated because the trial court failed to give a unanimity instruction. ^{HNI} When the State presents evidence of several distinct criminal acts, each of which could form the basis for one charged count, either the State must "elect" the act [*7] that it is relying upon for conviction or the court must instruct the jury to agree on a specific act. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991); see also State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984). The court's failure to follow this rule may result in a violation of the defendant's constitutional right to a unanimous jury verdict and right to a jury trial. State v. Camarillo, 115 Wn.2d 60, 64, 794 P.2d 850 (1990).

The State concedes that it failed to make an election in this case and that a unanimity instruction was required, but argues the error was harmless. Accordingly, we can affirm the jury's verdict only if the error was harmless beyond a reasonable doubt. State v. Camarillo, 115 Wn.2d at 64. Such an error in a multiple acts case is presumed to be prejudicial, and the presumption can be overcome only "if no rational juror could have a reasonable doubt as to any of the incidents alleged." State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988) (quoting State v. Loehner, 42 Wn. App. 408, 411, 711 P.2d 377 (1985) (Scholfield, A.C.J., concurring)).

Our [*8] Supreme Court elaborated upon the harmless error test in State v. Camarillo, *supra*, a prosecution for 1 count of indecent liberties. In Camarillo, the 11-year-old victim testified in detail about

three similar incidents of sexual contact occurring over a period of about a year. The defendant offered a general denial of the allegations, but did not otherwise challenge the victim's account or attempt to controvert or impeach the victim's testimony. Camarillo, 115 Wn.2d at 69-70. Under these circumstances, the failure to give a unanimity instruction was harmless error because a rational juror could not have distinguished among the incidents and would therefore have believed or disbelieved the victim as to all three incidents. Camarillo, 115 Wn.2d at 72.

In reaching its decision, the Camarillo court relied on a similar analysis in State v. Allen, 57 Wn. App. 134, 788 P.2d 1084 (1990). In Allen, the defendant flatly denied any physical contact with the victim, who had described multiple similar incidents of touching. In concluding that the absence of a unanimity instruction was harmless error, the Allen [*9] court noted the defendant had offered only a general denial as to all incidents and that he had failed to challenge or distinguish any of the specific incidents or offer any prior inconsistent statements or defense character witnesses. Allen, 57 Wn. App. at 139, 788 P.2d 1084.

Both the Camarillo and Allen courts distinguished the facts in State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988). In Kitchen, the court held that the absence of a unanimity instruction was not harmless error in two of the three consolidated cases. In these cases, the victims described several incidents of sexual contact. In addition to general denials, the defense had impeached the victims with prior inconsistent statements and presented general character witnesses or witnesses who had controverted some aspect of the victims' accounts. Given the conflicting testimony, the Kitchen court concluded that a rational juror could have entertained a reasonable doubt as to whether one or more of the alleged acts had occurred:

For example, some jurors may have based their verdict in State v. Albert Coburn on the testimony of the complaining witness in count 1 that Mr. Coburn [*10] touched her and attempted to touch her cousin when they were in the woods, while others may have based their decision on incidents that allegedly took place in the bedroom. Some jurors may have believed that Mr. Coburn touched the complaining witness in count 3 on the night she became upset while others determined that she was upset that night for other reasons, relying upon another act as basis for their verdict. Similarly, a reasonable juror could have doubted the *Kitchen* complaining witness' testimony that incidents occurred in a shower and believed that only those acts before school in the trailer actually occurred. Faced with these trial records, we cannot say that failure to ensure that Mr. Coburn and Mr. Kitchen were afforded a unanimous jury verdict was harmless error.

Kitchen, 110 Wn.2d at 412.

Here, C.V. described multiple similar incidents of abuse, but only in very general terms. When asked, C.V. was unable to identify any particular incident that stuck out in her memory; the focus of the evidence was the general pattern of the ongoing abuse. The deputy prosecutor did not attempt to distinguish among specific incidents during closing argument, [*11] noting that "[t]his case comes down to one simple question: Did the defendant touch these girls?" **Coleman's** defense was a general denial, and he maintained that C.V. was lying about all of the alleged touching. As in Camarillo and Allen, a rational juror could not have distinguished among the charged acts described by C.V. and would have had to believe C.V. as to all of the incidents in order to find **Coleman** guilty. See State v. Camarillo, 115 Wn.2d at 72.

But the failure to give a unanimity instruction as to M.D. was not harmless. In addition to testifying to a general pattern of ongoing abuse, M.D. described two specific incidents in detail. One incident involved touching that occurred while M.D. was sitting with **Coleman** in a leather chair in the living room, watching "The Mummy Returns." M.D. described how **Coleman** reached up under her shirt and started rubbing. In order to stop the touching, M.D. pretended to go to the bathroom and then sat on the floor. M.D. also described an incident that occurred in **Coleman's** bedroom when he told her that "it was his turn" and then made her touch his penis. M.D. acknowledged that she had not previously told anyone [*12] about this incident because she thought no one would believe her.

In addition to a general denial of M.D.'s allegations, the defense relied on general character evidence. M.D.'s mother testified that M.D.'s reputation for truthfulness was "bad," an assessment that M.D. herself acknowledged. The defense also impeached M.D. with her prior statement to the prosecution interview specialist, who testified that M.D. had denied touching **Coleman**. At trial, however, M.D. revealed for the first time that she had touched **Coleman's** penis. Defense counsel underscored the prior inconsistent statement during cross examination and closing argument.

Given the factually different incidents that M.D. described, and the presence of controverting character evidence and a prior inconsistent statement, the evidence is more comparable to that in *Kitchen* than in *Camarillo*. Under the circumstances, a rational juror could have had a reasonable doubt as to some of the incidents described by M.D. The failure to give a unanimity instruction was therefore not harmless beyond a reasonable doubt.

Coleman next contends that the trial court erred in admitting statements by C.V. and M.D. under RCW 9A.44.120 [*13], which sets forth the child hearsay exception. The challenged statements were admitted through testimony by the girls' teacher, the school counselor, a CPS social worker, an interviewer from the prosecutor's office, and M.D.'s mother.

^{HN2} An out-of-court statement by a testifying child victim is admissible under RCW 9A.44.120(1) if the court finds "that the time, content, and circumstances of the statement provide sufficient indicia of reliability." In determining the reliability of child hearsay, a court considers nine nonexclusive factors, including (1) whether the declarant had an apparent motive to lie; (2) the declarant's general character; (3) whether more than one person heard the statements; (4) the spontaneity of the statements; and (5) the timing of the declaration and the relationship between the declarant and the witness. *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). The court should also consider (6) whether the statements contain express assertions of past fact; (7) whether the declarant's lack of knowledge could be established by cross-examination; (8) the possibility of the declarant's recollection being faulty; [*14] and (9) whether the circumstances suggest the declarant misrepresented the defendant's involvement. *State v. Ryan*, 103 Wn.2d at 176. The final four factors are often "not very helpful" in assessing the reliability of child hearsay. *State v. Henderson*, 48 Wn. App. 543, 551 n.5, 740 P.2d 329 (1987).

The trial court considers the foregoing factors as a whole; not every factor must be satisfied. *State v. Swan*, 114 Wn.2d 613, 652, 790 P.2d 610 (1990). No single factor is decisive. *State v. Young*, 62 Wn. App. 895, 902, 802 P.2d 829, 817 P.2d 412 (1991). We review the trial court's determination of reliability solely for a manifest abuse of discretion. *State v. Pham*, 75 Wn. App. 626, 631, 879 P.2d 321 (1994).

In ruling that the statements were reliable, the trial court found that the girls did not have an apparent motive to lie. The evidence strongly supports this finding. While there was testimony that C.V. could be defensive and apparently did not like being called out "on the carpet" by the teacher, nothing supports an inference that she had a motive to lie about **Coleman**. In fact, both girls repeatedly [*15] stated that they liked **Coleman** and generally enjoyed being with him. Both C.V. and M.D. indicated that they had still been looking forward to going to Hawaii with **Coleman**. Nothing in the record provides significant support for an inference that the girls had some reason to fabricate the allegations.

The general character of the victims also supported admission of the statements. On appeal, **Coleman** suggests that both girls had a reputation for lying and that M.D. had made false allegations of abuse in the past. But as the trial court observed, when the specific allegations against C.V. and M.D. were examined in detail, they indicated that the girls' statements were essentially true or represented an understandable characterization given the girls' young age. The record supports the trial court's determination that C.V. and M.D. were "normal girls of their age," even though not everything they had said in the past was entirely true.

As to the third factor, C.V. and M.D. made similar statements describing the abuse to several different people. See *State v. Lopez*, 95 Wn. App. 842, 853, 980 P.2d 224 (1999). Contrary to **Coleman's** assertions, the inconsistencies or variations [*16] were minor; the girls consistently described the frequency and nature of the abuse.

The statements were also generally spontaneous. McAlpin testified that she did not think that C.V. had

planned on telling her about the abuse and that C.V. remained hesitant during the questioning. Barnes, Trudnowski, and Liebsack were all trained interviewers who stated that they asked the girls non-leading and open-ended questions. The professional training of most of the interviewers also supported the fifth factor: the timing of the statements and the relationship between the declarant and the witness. See State v. Lopez, 95 Wn. App. at 853.

Coleman does not challenge application of any of the remaining factors. When the Ryan factors are viewed in their totality, we cannot say that the trial court abused its discretion in finding the statements to be reliable.

Coleman next contends that his exceptional sentence must be reversed under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), because the court, rather than a jury, found the aggravating circumstances. ^{HN3} Under Blakely, any fact that increases the penalty for an offense [*17] beyond that authorized by the verdict must be submitted to a jury and proved beyond a reasonable doubt. Blakely, 124 S. Ct. at 2536. The State concedes that **Coleman's** exceptional sentences are invalid under Blakely, but argues the error was harmless because the jury necessarily found the aggravating circumstances when it found **Coleman** guilty. But our Supreme Court has rejected this argument, concluding that a harmless error analysis cannot be applied to Blakely errors. State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (No. 75063-7, April 14, 2005). Accordingly, **Coleman** is entitled to be resentenced within the standard range. State v. Hughes, supra.

Coleman raises several additional issues in his pro se statement of additional grounds. See RAP 10.10. He first alleges that his speedy trial rights were violated. But **Coleman** has not submitted a sufficient record of the challenged rulings to permit review. He also suggests that the trial court erred by refusing to rule on the speedy trial issues and "deferring" the matter for the Court of Appeals. But the trial court effectively denied **Coleman's** motions to dismiss, correctly noting that he would [*18] have to raise any further challenge on appeal.

Coleman next contends that the trial court erred in denying his motion to dismiss because of the State's failure to comply fully with a discovery order. The motion concerned the late disclosure of the CPS social worker's interview of the victims. The trial court denied the motion to dismiss and granted the defense a continuance to investigate the evidence. ^{HN4} Dismissal of a criminal prosecution is an "extraordinary remedy," and the trial court did not abuse its discretion in denying the motion to dismiss. See State v. Ramos, 83 Wn. App. 622, 636-37, 922 P.2d 193 (1996).

Coleman next contends that the CPS social worker's testimony should have been excluded because she failed to complete an official investigation report within 14 days as required by statute. ^{HN5} Because this issue is raised for the first time on appeal, we will not consider it. RAP 2.5(a).

Coleman next contends that the deputy prosecutor committed reversible misconduct during closing argument by asking the jury to overlook inconsistencies in the victims' testimony. But ^{HN6} the deputy prosecutor has wide latitude in closing argument to draw reasonable inferences [*19] from the evidence. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). The deputy prosecutor here properly argued that the jurors could draw reasonable inferences from the evidence; no misconduct occurred.

Finally, **Coleman** asserts that the trial judge was biased. But he has failed to identify the nature of the alleged errors sufficiently to permit meaningful review. See RAP 10.10(c).

We affirm **Coleman's** conviction on Count I (involving C.V.), reverse **Coleman's** conviction on Count II (involving M.D.), and remand for further proceedings. On remand, **Coleman** is entitled to be resentenced within the standard range.

Affirmed in part, reversed in part, and remanded.

For the court:

/s/ COX, C.J.

/s/ AGID, J.

/s/ BAKER, J.

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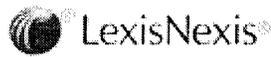
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	NO. 77706-3
)	
v.)	
)	
JOHN COLEMAN,)	
)	
PETITIONER.)	

DECLARATION OF SERVICE

I, MARIA ARRANZA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 31ST DAY OF JULY, 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL:

[X] KING COUNTY PROSECUTOR'S OFFICE
APPELLATE UNIT
KING COUNTY COURTHOUSE
516 THIRD AVENUE, W-554
SEATTLE, WA 98104

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF JULY, 2006.

x _____
me